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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

NEWPORT TANKERS CORPORATION,

Petitioner,

v.

WILLIAM MICHAEL SIMMONS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LOUIS H. BEARD
WELLS, PEYTON, BEARD,
GREEN, HUNT & CRAWFORD
P. O. Box 3708
Beaumont, Texas 77704

Counsel for Petitioner,
Newport Tankers
Corporation

QUESTIONS PRESENTED

1. Whether, on the record as a whole, the decision of the Court of Appeals in this Jones Act case in holding Petitioner, a ship operator, liable in damages for adhesions sustained by Respondent, a crewmember, after an appendectomy, is tantamount to a holding that a ship operator is liable for any adverse effect to a crewmember arising from medical attention afforded by the ship operator irrespective of negligence or malpractice.

2. Whether, on the record as a whole, the decision of the Court of Appeals in holding Petitioner liable in damages for adhesions sustained by Respondent after an appendectomy constitutes a holding which is in conflict with holdings of the Supreme Court of the United States and of other Courts of Appeal.

3. Whether the findings of fact made by the Trial Court were so clearly erroneous as to be contrary to law thereby calling for the exercise of the Supreme Court's power of supervision.

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Petitioner, NEWPORT TANKERS CORPORATION, respectfully prays that Writ of Certiorari issue from this Court to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The Court of Appeals for the Fifth Circuit decreed that its opinion not be published. It is reproduced in the Appendix Page 2. No opinion was rendered by the District Court for the Eastern District of Texas.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on January 21, 1981. No motion for Rehearing was filed. This petition was filed within ninety (90) days of January 21, 1981. This Court's jurisdiction is invoked under 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED

1. Whether, on the record as a whole, the decision of the Court of Appeals in this Jones Act case in holding Petitioner, a ship operator, liable in damages for adhesions sustained by Respondent, a crewmember, after an appendectomy, is tantamount to a holding that a ship operator is liable for any adverse effect to a crewmember arising from medical attention afforded by the ship operator irrespective of negligence or malpractive.

2. Whether, on the record as a whole, the decision of the Court of Appeals in holding Petitioner liable in damages for adhesions sustained by Respondent after an appendectomy constitutes a holding which is in conflict with holdings of the Supreme Court of the United States and of other Courts of Appeal.

3. Whether the findings of fact made by the Trial Court were so clearly erroneous as to be contrary to law thereby calling for the exercise of the Supreme Court's power of supervision.

PORTIONS OF THE RECORD

Findings of Fact and Conclusions of Law made by the Trial Court is attached in the Appendix Page 5...

A Summary of Salient Parts of the Record is attached in the Appendix Page 9...

PARENT, AFFILIATE AND SUBSIDIARY COMPANIES OF PETITIONER

There is none.

STATEMENT OF THE CASE

This is a Jones Act suit. The basis for jurisdiction in the Trial Court is Rule 9(h) of the Federal Rules of Civil Procedure, the Jones Act, 46 U.S.C.A. §688, and the general maritime law of the United States, 28 U.S.C.A. §1333.

Respondent, WILLIAM MICHAEL SIMMONS, served as a pantryman aboard the S/T ACHILLES, owned and operated by Petitioner, NEWPORT TANKERS CORPORATION. While in the Port of Poti, Russia, and on July 8, 1977, Respondent suffered an attack of appendicitis necessitating his hospitalization and an emergency appendectomy in a hospital located in Poti, Russia.

Respondent made an uneventful recovery from the appendectomy. On or about September 12, 1977, Respondent resumed work; however, he continued to complain of pain in the abdominal area. On March 17, 1978, Respondent underwent an exploratory laparotomy in the Buna Medical Center Hospital, Buna, Texas, which was performed by John L. Sessions, a doctor of osteopathy. He found that adhesions had formed in the area of the appendix and these were removed. Respondent testified that subsequent to the laparotomy the pain in the abdominal region no longer persisted.

The trial of the case was before the Court in the United States District Court for the Eastern District of Texas, Beaumont Division, and upon conclusion of the trial the Court made findings of fact and conclusions of law (attached in Appendix Page 5..) and entered judgment for the Respondent. The Fifth Circuit Court of Appeals affirmed the judgment for Respondent.

The contentions of the Respondent were that Petitioner was negligent in the selection of the medical facility in Poti, Russia, and in the selection of the doctors who attended the Respondent and that the doctors in performing the appendectomy were negligent and that such negligence was the proximate cause of the injuries and damages sustained by Respondent. On the other hand, Petitioner contended that it exercised reasonable care in selecting the medical facility and the doctors who attended Respondent and that the doctors were not negligent and that Petitioner was not otherwise negligent. Petitioner contended further that the adhesions which formed subsequent to the

appendectomy in Poti, Russia formed as a natural consequence of the appendectomy and their forming was not caused by the negligence of the surgeon.

REASONS FOR GRANTING THE WRIT

1. In view of the total absence of evidence of probative value supporting a finding of negligence against petitioner, the decision below represents a holding that a shipowner is liable for any adverse effect to a crewmember arising from medical attention afforded by the shipowner, which holding is in conflict with holdings by the Supreme Court and other Courts of Appeal.

Several established rules of law are to be kept in mind when considering this case:

A. In Jones Act cases the shipowner must furnish medical attention to the ill or injured seaman and is liable for failing to do so without regard to fault or negligence.

B. In Jones Act cases the shipowner is liable to the seaman on proof that the shipowner was negligent in selecting the medical facility or doctor.

C. In Jones Act cases the shipowner is liable to the seaman on proof that the physician selected by the shipowner was negligent in treating the seaman.

D. In Jones Act cases the physician selected by the shipowner to treat the seaman is bound by a standard of care, that being to exercise the degree of care and skill of the average qualified practitioner of the art and science of medicine.

In considering this case, it must be done against the backdrop of the circumstances of the Respondent having suffered an attack of appendicitis in a foreign port, to-wit, Poti, Russia. Clearly, what would constitute the exercise of reasonable care by a ship operator in providing medical attention to a seaman in Poti, Russia may very well not constitute the exercise of reasonable care in providing medical attention to a seaman in Norfolk,

Virginia or New Orleans, Louisiana. In Poti, Russia, Captain D. H. Mappin, of the S/T ACHILLES, had no discretion in selecting the agent who would service the vessel. Inflot selected the medical facility and sent Respondent to the hospital in Poti, Russia for the appendectomy. Prior to the operation, Captain Mappin did have an opportunity to make an independent survey of the facility and concluded that it was adequate in every respect, and, additionally, was reassured by the agent of its adequacy.

The record shows that Captain Mappin and the agent believed the surgeon and nurses competent to perform the appendectomy. As the appendectomy was performed successfully, this attests to their competency.

The matter of knowing in advance of the availability of adequate medical facilities and competent physicians in a foreign port presents questions which cannot be answered satisfactorily in advance. The operator of the vessel must of necessity rely upon the recommendations of his agent, and in particular in Poti, Russia where the ship operator has no choice as to the agent who will service its vessel.

The adverse effect suffered by Respondent was adhesions. The presence of adhesions does not prove the incompetency of the Russian surgeon or that he performed the appendectomy in a negligent way. It is an undisputed medical fact that adhesions form to some degree in all patients after all appendectomies. The extent to which they show up will vary. Adhesions will form whether the surgeon is competent or incompetent, and whether the operation is performed properly or improperly. Thus it is Petitioner's position that the adhesions found in Respondent were a normal sequel of the surgery.

The Fifth Circuit Court of Appeals has stated in its opinion:

> " 'The maritime law has long imposed upon shipowners the duty to provide proper medical treatment for seamen falling ill or suffering injury in the service of the ship. This is a

> duty imposed without fault; it is no mere formal obligation. . . .' *Fitzgerald* v. *A. L. Burbank & Co.*, 451 F.2d 670, 679 (2d Cir. 1971) (citations omitted). In *Central Gulf S.S. Corp.* v. *Sambula*, 405 F.2d 291 (5th Cir. 1968), this court found no 'distinction between the responsibility of a ship for a physician in its regular employ and its responsibility for the negligence of an independent physician engaged to fulfill a singular duty to provide maintenance and cure.' " 405 F.2d at 302 n.7.

Thus the Court below recognized that in the first instance the shipowner must furnish medical attention to the ill or injured seaman and failing to do so it is liable to the seaman irrespective of negligence or fault. In the second instance the Court Below recognizes that the shipowner may be liable to the seaman upon proof of negligence on the part of the shipowner in selecting the medical facility or doctor, or negligence of the doctor. But in the subject case the adhesions suffered by the Respondent after the appendectomy formed as a natural consequence of the surgery. For this Petitioner to be held liable for this adverse effect to the Respondent is tantamount to a holding by the Court Below that the shipowner is liable for any adverse effect to the seaman irrespective of fault or negligence. Petitioner submits that this is not the law, and that the Court Below has fallen into error.

Admittedly, in its opinion, the Fifth Circuit Court has stated "there was ample evidence to support the Trial Judge's conclusions that the seaman's problems were caused by adhesions, that the adhesions were more severe than those that would follow surgery performed with adequate skill and that the Russian surgeon was negligent;" however, when all of the facts and circumstances are considered, there is no evidence of probative value that the Russian surgeon was negligent.

Petitioner believes and urges that the Fifth Circuit Court failed to give adequate and proper attention to the following facts and rules of law and had it done so it would have reversed the decision of the Trial Court:

1. The fact that this case has as its setting Poti, Russia, a foreign port.

2. The fact that under the Government of Russia foreign vessels in their ports must use as their agent Inflot, which is an arm of the Russian Government.

3. The fact that Respondent's appendicitis attack and appendectomy constituted an emergency.

4. The rule of law that the duty of the shipowner to care for ill crewmembers varies with the circumstances of each case.

5. The rule of law that the proper standard for malpractice (negligence) is simply whether the physician exercised the degree of care and skill of the average qualified practitioner of the art and science of medicine.

It is the holding of this Honorable Court that in order for the injured seaman to recover there must be proof of negligence against the ship operator in selecting the medical facility or physician, or proof of negligence of the physician selected to treat the seaman. This is the holding of this Honorable Court in *DeZon* v. *American President Lines, Ltd.*, 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065 (1943). Mr. Justice Jackson delivered the opinion of the Court stating:

> "We hold, therefore, that the shipowner was liable in damages for harm suffered as a result of any negligence on the part of the ship's doctor . . .
>
> "We come, then, to the question as to whether there was sufficient proof of negligence to require sending this case to the jury . . .
>
> "The doctor apparently made a wrong diagnosis, but that does not prove that it was a negligent one. It seemed to be the obvious diagnosis from the history which the patent gave him, and that appears to have been incomplete and not unlikely to mislead . . .
>
> "The loss of Petitioner's eye is a serious handicap. But damages may be recovered under the Jones Act only for

> negligence. *Jamison* v. *Encarnacion, supra,* 281 U.S. at p. 639, 50 S.Ct. at p. 442, 74 L.Ed. 1082. Whether the legislative policy of compensating only on the basis of proven fault is wise is not for us to say, nor is it our function to circumvent it by reading into the law a theory, however disguised, that a physician who undertakes care guarantees cure, and that each unsuccessful effort of the physician may be visited with a successful malpractice suit."

That there must be a showing of negligence is also the holding of this Honorable Court in the cases of *Cortes* v. *Baltimore Insular Line, Inc.,* 287 U.S. 376, 53 S.Ct. 173, 77 L.Ed. 368 (1932) and in *The IROQUOIS,* 194 U.S. 240, 24 S.Ct. 640, 48 L.Ed. 955 (1904).

That there must be proof of negligence in the selection of the medical facility or physician, or proof of negligence of the treating physician prior to the shipowner being liable to the injured or ill seaman is also the established rule in the Second Circuit. In *Fitzgerald* v. *A.L. Burbank & Co. Ltd.,* 451 F.2d 670, 1972 A.M.C. 207 (C.A.2d, 1971), the seaman was engaged in "blowing down" the boilers in the engine room in extremely hot temperatures. He collapsed and was taken ashore to a hospital where he died of heat exhaustion and pneumonia.

The Court stated at p. 679 of its opinion:

> "In the circumstances of this case, there are two ways in which the shipowner may have been negligent in exercising this duty. One is in improperly providing for a seaman's care, including the negligent selection of a doctor; the other is in the negligence of the doctor himself, see *DeZon, supra,* 318 U.S. at 664-665, 63 S.Ct. 814; *Central Gulf Steamship Corp.* v. *Sambula,* 405 F.2d 291 (5 Cir. 1968)."

The United States Court of Appeals for the Third Circuit has held in accord with the decisions of this Honorable Court and of the Second Circuit. See *Graham* v. *Alcoa S.A., Inc.,* 201 F.2d 423 (3 Cir. 1953); cert. denied, 346 U.S. 832, 74 S.Ct. 32, 98 L.Ed. 355.

Until its decision in the subject case, the United States Court of Appeals for the Fifth Circuit also followed the rule that there must be proof of negligence in the selection of the medical facility or physician, or proof that the treating physician was negligent in order for the injured or ill seaman to recover against the shipowner. In *Central Gulf Steamship Corp.* v. *Sambula*, 405 F.2d 291 (C.A.5, 1968), the shipowner was held liable for reason of the failure of the shipowner to consult an eye specialist available in the vicinity of Inchon, Korea and the negligence of the treating physician in failing to properly diagnose the eye injury sustained by the seaman.

There can be no plausible argument made that there was negligence on the part of the Petitioner in its selecting the hospital where the appendectomy was performed on the Respondent. Poti, Russia is a port city with many excellent facilities. In 1976, the population of Poti, Russia was 54,000. The work *Great Soviet Encyclopedia*, Vol. 20, p. 279, describes Poti:

> "Poti has a shipyard, a flour mill, and plants that manufacture hydraulic equipment, electrical equipment, and dynamoelectric amplifiers. An important fishing center, Poti has a fish combine. Educational and cultural institutions include an evening division of the Georgian Polytechnical Institute, the Colchis Integrated Cultural Experimental Station of the All-Union Scientific Research Institute of Tea and Subtropical Crops, a Hydraulic Development Technetium, *Medical* and Music Schools, a Drama Theater, and a Museum of Local Lore."

The proof in this case shows that the hospital in which Respondent received his appendectomy was a two-story stone structure. There was a waiting room and an operating room. The room occupied by the Respondent was a semi-private room containing furniture. There was linoleum-type covering on the floor. There were sheets on the bed. A male surgeon and nurses were in attendance. Very clearly, the medical facility selected by the Master of the S/T ACHILLES was adequate. There can be no

negligence attributable to the Petitioner in the selection of the particular medical facility.

Turning to the second inquiry, that is, whether the surgeon who performed the appendectomy on the Respondent was negligent. It is abundantly clear that he was not negligent. The only facts which can be pointed to which would support a finding of negligence are the following:

Dr. John L. Sessions, the doctor of osteopathy, of Kirbyville, Texas, was employed by the Respondent to perform the exploratory surgery, that is, the laparotomy. After performing the laparotomy, he found limited adhesions. During the course of his deposition he testified that "apparently there was some bleeding after the surgery inside, and irritation resulted from the absorbing of the blood." He testified further that the "procedure" which was conducted in Russia in surgery was the cause of the adhesions in Respondent. The reliability of these two observations made by Dr. John L. Sessions must be given close scrutiny. Of course, Dr. Sessions was not in attendance at the time of the appendectomy. Thus his observations are pure speculation and are of no probative value and do not constitute evidence upon which a finding of negligence can be based.

Respondent argues a further point in support of the fact that the surgeon was negligent. During the exploratory laparotomy, Dr. Sessions found a part of a suture in the appendeceal stump. Subsequently the pathologist, Dr. H. R. Wilcox, examined the specimen from the area of the appendix of the Respondent containing the part of the suture. He observed the part of the suture, but found no indication of inflammation. He gave the diagnosis of "granulation tissue from appendeceal stump." The Petitioner called Dr. A. H. Tew, a Board certified surgeon, who testified that in the United States surgeons use absorbable and nonabsorbable sutures at their discretion. Thus the non-absorbable suture played no part in causing the adhesions, the Russian surgeon was not negligent in using it.

Respondent contends further that the finding of adhesions supports its argument that the surgeon was negligent. The fact of finding adhesions is certainly not evidence of probative value supporting the argument of negligence. Adhesions form to some degree after every appendectomy irrespective of the competence of the surgeon. Dr. Tew, a Board certified surgeon, testified that in connection with every appendectomy adhesions appear to some degree.

2. The decision below has decided an important question of federal law, that is, that a shipowner is liable for any adverse effect to a crewmember arising from medical attention afforded by the shipowner without reference to the standard of care to be exercised by a physician treating a crewmember in a foreign port, which decision is thereby in conflict with applicable decisions of the Supreme Court.

It is to be remembered that there is a standard of care which applies to the work of the treating physician and there must be a finding that the treating physician failed to meet this standard of care. In malpractice cases in the United States, the Courts have followed a "locality" rule and a physician is held only to the standard of care existing in the area in which he practices. That is not the standard of care required in a Jones Act case of a treating physician in a foreign land. In *Fitzgerald* v. *A. L. Burbank & Co. Ltd.*, 451 F.2d 670, 1972 AMC 207 (C.A.2d, 1971) the Second Circuit Court had under consideration the standard of care to be exercised by treating physician located in Bahrain Hospital, Bahrain Island, Persian Gulf. In the opinion by Circuit Judge Anderson of the Second Circuit, he enunciated the rule as follows:

> "Both the duty to provide maintenance and care and the Jones Act are maritime provisions designed to compensate for the often harsh and dangerous life of a seaman. To require him to prove the standard of care of the medical profession in some far distant land is incompatible with

> their intent and purpose. Assuming that reasonably adequate medical facilities were available, the proper standard for malpractice is simply whether the physician exercised the degree of care and skill of the average qualified practitioner of the art and science of medicine."

It is submitted that in the subject case the operating surgeon in Poti, Russia, who performed the appendectomy on the Respondent, "exercised the degree of care and skill of the average qualified practitioner of the art and science of medicine."

It is to be noted that in the opinion attached hereto in the Appendix Page 2, and written by Circuit Judge Rubin of the Fifth Circuit Court of Appeals, he makes no reference to the standard of care. He affirms a finding of fact by the Trial Court that the operating physician was negligent without giving attention to the "standard of care" test enunciated in *Fitzgerald*. No plausible argument can be made that the Petitioner through the operating surgeon in Poti, Russia failed to meet the enunciated "standard of care." Is it reasonable to assert that the finding of limited adhesions during the exploratory operation, the finding of a nonabsorbable suture and the conclusion expressed by the doctor of osteopathy who performed the laparotomy that "the procedure" in Russia caused the adhesions sufficient evidence upon which the Court can conclude that the operating physician was negligent or guilty of malpractice? It is submitted that it is not when the "standard of care" test enunciated in *Fitzgerald* is applied to those facts. The operating physician did all that he could do. When the Respondent entered the hospital, a blood test was made. The blood count was high. The appendectomy was performed within a period of two hours after Captain Mappin had been notified by the Respondent of his desire for medical attention. It was an emergency situation, for the Respondent was sick, vomiting and knew that he needed medical attention. The life of the Respondent was saved. Adhesions did form, but these were a natural consequence of the surgery. Their

forming was in no way related to any act of negligence on the part of the operating physician.

The Fifth Circuit Court of Appeals in its opinion cites the case of *Central Gulf S.S. Corp.* v. *Sambula,* 405 F.2d 291 (C.A. 5 1968). In that opinion, Circuit Judge Goldberg stated at p.300 the following:

> "The IROQUOIS and the DeZon instruct us that the ship through its Captain, has a duty to care for sick or injured crewmembers; and this duty, whose measure varies with the circumstances of each case, admits of no perfunctory discharge. The duty is not to be conceived and executed in a vacuum. Rather, its operational dimensions have rational variables. The extent of the duty varies with the nature of the injury and the relative availability of medical facilities . . ."

The Fifth Circuit Court of Appeals thus recognizes that circumstances can alter the duties thrust upon the shipowner. Considering the facts that the appendectomy was performed in Poti, Russia, that the Respondent needed immediate medical attention, that it constituted an emergency situation, that the Petitioner had to work through its agent, Inflot, that the appendectomy was performed within a period of two hours and the only adverse effect was adhesions, Petitioner met its duties to the Respondent as required by law.

The Supreme Court has established the rule that it will not award damages in every case where there is some adverse effect which flows from the medical attention given by the shipowner to a seaman.

In *DeZon* v. *American President Lines*, 318 U.S. 660, 63, S.Ct. 814, 87 L.Ed. 1065 (1942), the seaman lost an eye apparently through a wrong diagnosis made by the doctor, but the Supreme Court denied to the seaman recovery of damages because there was no proof of negligence. Mr. Justice Jackson stated at Page 820:

> "Whether the legislative policy of compensating only on the basis of proven fault is wise is not for us to say, nor is it our function to circumvent it by reading into the law a theory, however disguised, that a physician who undertakes care guarantees cure, and that each unsuccessful effort of the physician may be visited with a successful malpractice suit."

Thus in *DeZon* this Honorable Court recognizes that when the standard of care is followed then the seaman will not recover damages notwithstanding the fact that he suffers some adverse effect from the treatment received. Just as a scar on the abdomen is a natural sequel of an appendectomy so is adhesions a natural sequel of an appendectomy. Certainly there could be no thought of awarding damages for the scar and adhesions should fall into the same category.

The Courts have given particular weight to the fact that the medical attention given by the shipowner has been in a foreign port when determining whether the standard of care has been met. As in the subject case the place of the surgery was Poti, Russia, this in itself constitutes an additional reason for holding that Petitioner has met the standard of care. In *Walker* v. *Sinclair Refining Company*, 331 F.Supp. 408 (D.C.Pa. 1971), the Court denied recovery to a seaman who claimed he was negligently cared for in a hospital in Ponce, Puerto Rico.

3. The findings of fact made by the trial court, and which were sustained by the Fifth Circuit Court of Appeals, are so clearly erroneous as to be contrary to law, thereby calling for the exercise of the Supreme Court's power of supervision.

Petitioner urges that Respondent has failed to meet its burden of proving negligence of Petitioner which played a part in causing damages to Respondent. The record is absolutely devoid of any proof of negligence of Petitioner which proximately caused damages to Respondent.

The Findings of Fact and Conclusions of Law attached hereto in Appendix Page 5. show no specified act of negligence supported by probative evidence which resulted in the adhesions. The only evidence which can be pointed to by Respondent is the following: limited adhesions were found in Respondent, a part of a suture was found in Respondent, but there was no infection; the doctor of osteopathy, John L. Sessions, testified that it was that "procedure" in Russia which caused Respondent's problems. This is all the evidence. There is no more. Even assuming that it is some evidence, it is evidence of no probative value. Accordingly, the subject case is one which calls for the application of the rule which has been followed in many decisions, that on the record as a whole, the findings of the Trial Court which were sustained by the Fifth Court of Appeals are clearly erroneous. A mistake has been committed. The Judgment entered against Petitioner that Respondent recover from it $35,000.00 is clearly contrary to law. This Judgment should be reversed. See *McAllister* v. *United States*, 348 U.S. 19, 20, 75 S.Ct. 6, 8, 99 L.Ed. 20, 24 (1954); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 766 (1948); *Coulter* v. *Ingram Pipeline, Inc.*, 511 F.2d 735 (5th Cir. 1975); Fed. R. Civ. P., 52(a).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and opinion of the Fifth Circuit.

Respectfully submitted,

. . . . . .

LOUIS H. BEARD
WELLS, PEYTON, BEARD,
GREENBERG, HUNT & CRAWFORD
624 Petroleum Building
P. O. Box 3708
Beaumont, Texas 77704
Telephone (713) 838-2644
State of Texas Bar
Card No. 01975000

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WILLIAM MICHAEL SIMMONS,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the .... day of March, 1981, I mailed three copies of the Petition for Writ of Certiorari to the Honorable March H. Coffield, counsel for the Respondent, by placing the same in the United States Mail, postage prepaid, certified, return receipt requested, addressed to his offices, P. O. Box 480, Jasper, Texas 75951.

.....

LOUIS H. BEARD
WELLS, PEYTON, BEARD,
GREENBERG, HUNT & CRAWFORD
P. O. Box 3708
Beaumont, Texas 77704
Telephone (713) 838-2644
Counsel for Petitioner

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APPENDIX

A-2

DO NOT PUBLISH

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

No. 79-3201

WILLIAM MICHAEL SIMMONS,

Plaintiff-Appellee,

VERSUS

NEWPORT TANKERS CORP.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

(January 21, 1981)

Before WISDOM, RUBIN and SAM D. JOHNSON,
Circuit Judges.

RUBIN, Circuit Judge:

Having suffered an attack of appendicitis while in a Russian port awaiting fumigation of his vessel, a seaman was treated by a Russian doctor who performed an emergency appendectomy. After an uneventful recovery, the seaman returned to the United States where he experienced abdominal pains, sought medical attention and eventually submitted, on medical advice, to an exploratory laparotomy. The attending surgeon testified by deposition that the seaman was suffering from adhesions, that the type of suture used by the Russian doctor caused the seaman's

reaction and that the type of suture American doctors use would not cause such a reaction. The surgeon further testified that, had the appendectomy been performed correctly, the extensive adhesions suffered by the seaman would not have resulted and the laparotomy would not have been required. Another doctor, called by the defendant, testified that the adhesions were a normal sequel of the surgery and that the Russian surgical procedure was not negligently performed. The seaman sued his employer for damages, the case was tried to the court and the trial judge awarded judgment in favor of the plaintiff. Having determined that his findings were not clearly erroneous, Fed. R. Civ. P. 52, and that his legal conclusions were not incorrect, we affirm.

"The maritime law has long imposed upon shipowners the duty to provide proper medical treatment for seamen falling ill or suffering injury in the service of the ship. This is a duty imposed without fault; it is no mere formal obligation. . . ." *Fitzgerald* v. *A. L. Burbank & Co.*, 451 F.2d 670, 679 (2d Cir. 1971) (citations omitted). In *Central Gulf S.S. Corp.* v. *Sambula*, 405 F.2d 291 (5th Cir. 1968), this court found no "distinction between the responsibility of a ship for a physician in its regular employ and its responsibility for the negligence of an independent physician engaged to fulfill a singular duty to provide maintenance and cure." 405 F.2d at 302 n.7.

There was ample evidence to support the trial judge's conclusions that the seaman's problems were caused by adhesions, that the adhesions were more severe than those that would follow surgery performed with adequate skill and that the Russian surgeon was negligent. For these reasons, we need not explore the additional bases for the award relied upon by the trial court. The amount of the verdict being uncontested, the judgment is AFFIRMED.

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF
TEXAS
MAR 9 1981
MURRAY L. HARRIS,
CLERK
BY DEPUTY
/s/ JUDY L. LEWIS

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-3201

D. C. Docket No. B-77-369-CA

WILLIAM MICHAEL SIMMONS,
Plaintiff-Appellee,

v.

NEWPORT TANKERS CORP.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

Before WISDOM, RUBIN and SAM D. JOHNSON,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that defendant-appellant pay to the plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

JANUARY 21, 1981

ISSUED AS MANDATE:

IN THE
UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-77-369-CA

WILLIAM MICHAEL SIMMONS

VS.

NEWPORT TANKERS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled and numbered cause having come on for trial before the Court, and the Court having heard the evidence and argument of counsel, and being fully apprised in the premises, now finds the following:

FINDINGS OF FACT

(1) That at all times material hereto, plaintiff, William Michael Simmons, was a seaman and a member of the crew of the S/T ACHILLES.

(2) That at all times material hereto, defendant, Newport Tankers Corporation, was the owner of the S/T ACHILLES and the employer of its crew, including the officers of said vessel, and plaintiff, William Michael Simmons.

(3) That said vessel was taken to port in Poti, Russia, for the purpose of fumigating the vessel.

(4) That while said vessel was in port in Poti, Russia, the crew, including plaintiff, were housed in a hotel.

(5) That on or about July 8, 1977, plaintiff became ill with appendicitis and was sent by the master of the said vessel, D. H. Mappin, to a hospital in Poti, Russia, for treatment.

(6) That the surgeons in Poti, Russia, who performed an appendectomy on plaintiff were selected by the master of the vessel in question.

(7) That Poti, Russia, had a population of approximately 50,000 persons.

(8) That within a reasonable travel distance of Poti, there are five (5) cities, Batumi, Kutaisi, Sukhumi, Sochi, and Novorossiysk, each of which had a population of 100,000 persons, or more.

(9) That the quality and availability of medical, surgical and hospital services and facilities in Russia are significantly affected by population.

(10) That the master of the vessel in question admitted that the facilities at the hospital in Poti were primitive and that they appeared primitive to him.

(11) That the appendectomy performed on plaintiff on July 8, 1977, was done with a local anesthetic, instead of a general anesthetic.

(12) That the surgery on plaintiff was negligently performed and directly and proximately resulted in personal injuries to plaintiff, and necessitated additional corrective surgery, a laparotomy, on March 17, 1978.

(13) The defendant, and its officers, was negligent in its selection of doctors and facilities used to perform the surgery on plaintiff.

(14) That defendant, and its officers, was negligent in failing to transport plaintiff to doctors and facilities in the vicinity of Poti, Russia for surgery and treatment.

(15) That defendant, and its officers, was negligent in selecting Poti, Russia, for the fumigation of its said vessel when the medical facilities there were primitive.

(16) That defendant, and its officers, was negligent in failing to determine the quality of medical facilities and doctors in Poti, Russia, prior to selecting that port for fumigation of the vessel in question.

(17) That defendant, and its officers, was negligent in failing to furnish plaintiff a reasonably safe place in which to work.

(18) That the negligence of defendant, and its officers, played a part in and proximately caused damages to plaintiff.

(19) That the sum of $35,000.00, if paid now in cash, would reasonably compensate plaintiff for his damages caused by the said negligence of plaintiff, and its officers.

CONCLUSIONS OF LAW

(1) That this Court has jurisdiction of the parties and the subject matter of this cause.

(2) That the *Jones Act,* 46 U.S.C.A. §688, applies to the facts of this cause.

(3) That the allegations contained in the plaintiff's trial pleadings and the contentions made by plaintiff in the Pre-Trial Order in this cause and the evidence herein give rise to a duty on the defendant, and its officers, to exercise reasonable care in the selection of a port, the selection of doctors and medical facilities for plaintiff, to provide reasonable medical attention and treatment for plaintiff, and to furnish plaintiff a reasonably safe place to work.

(4) That the evidence in this cause establishes that defendant, and its officers, breached its duties to plaintiff.

(5) That plaintiff is entitled to recover $35,000.00 of and from the defendant for his damages, and shall have Judgment for that amount herein.

(6) That interest at the rate of 9% per year shall run on the said $35,000.00 from and after Judgment in this cause.

Let Judgment be entered accordingly.

SIGNED and ORDERED ENTERED this 11th day of September, 1979.

/s/ JOE J. FISHER
Judge Presiding

SUMMARY OF SALIENT PARTS OF THE RECORD

The Master of the S/T ACHILLES, D. H. Mappin, testified that the hospital appeared to him to be clean, adequate and of a type where the Respondent would receive proper attention. He was convinced that the doctors and nurses were qualified, and if the appendectomy was performed that it would be done in first-class fashion. He was reassured with regard to these matters by Inflot, an agency of the Russian Government, which was acting as agent for the s/T ACHILLES. (Tr. pp. 100-101).

Chief Mate, William R. Horne, testified that when a vessel enters a port in Russia it is required to work through Inflot, which is an arm of the Russian Government, and the owner or operator of the vessel has no discretion in naming the agent. (Tr. p. 82, his deposition p. 11).

Some of the members of the crew required medical attention while in the first port entered in Russia, the Port of Novorossiysk, and Inflot was there acting as agent. The members of the crew treated ashore at Novorossiysk made no complaints that the medical attention which they received was in any way faulty. (Tr. p. 83, his deposition p. 20).

Chief Mate Horne described the hospital in Poti, Russia as a stone building of two or possibly three stories which was situated right across the street from the Inflot office. Others of the crew went to the hospital in Poti for medical attention and none complained about the attention received. (Tr. p. 85, his deposition pp. 29, 30, 31).

Chief Mate Horne identified the Medical Log of the ship and the entry therein regarding the Respondent:

> "Simmons underwent an emergency operation for appendicitis at the hospital at Poti, USSR."

The report shows that the operation took place on July 8, 1977, at about 1500 hours and Respondent was released from the hospital in an ambulatory condition on July 18, 1977. (Tr. pp. 86, 87).

Carol Ann Stevenson Mappin was the wife of the Master of the S/T ACHILLES and was aboard as Librarian. (Tr. p. 89). She testified that Captain Mappin had no discretion in selecting the agent for the ship while in Russia and that it was Inflot's responsibility to take care of any of the ship's crew who needed medical attention. Inflot would be contacted to make arrangements for the medical attention required. She testified that insofar as the work done by Inflot in behalf of the ship, everything was quite satisfactory. (Tr. p. 91, her deposition pp. 15-16).

Mrs. Mappin testified that the crew was staying in a hotel in Poti while the vessel was being fumigated. (Tr. p. 92, her deposition pp. 25-26). Respondent related to Captain Mappin that he had vomited in the shower and Captain Mappin told him to go to the doctor immediately and directed him to the agent, Inflot. Very soon the agent called the Captain on the phone advising him that Respondent needed an operation and the Captain went immediately to the hospital. (Tr. pp. 92-94, her deposition pp. 31-33).

Mrs. Mappin described the hospital as a two-story brick structure consisting of two buildings. She described the room occupied by Respondent as measuring 25 to 30 feet square, having one window, and having furniture consisting of a large wooden cabinet, a nightstand, and one long table with a chair by it and having two beds. The floor was covered with a linoleum-type covering. There were white sheets on the bed. On each occasion when she entered the room there would be nurses present, but they would leave upon her entering. Mrs. Mappin's purpose in going to the hospital was to find out how the Respondent was doing, and Respondent's response was always a

big grin and that everything was fine. She described the hospital as being the best that Poti had to offer. (Tr. pp. 94-95, her deposition pp. 33-46).

Dr. Alton H. Tew, a Diplomat of the American Board of Surgeons since 1950, testified for Petitioner and testified that he had performed three hundred to five hundred appendectomy operations. (Tr. pp. 27-30). He stated that an appendectomy would ordinarily take thirty minutes to an hour and a half, and is considered a routine operation today in the medical field, and for a young man of twenty-five years of age, as the Respondent was at the time of his operation, complete recovery usually would take four weeks. (Tr. pp. 31-32).

Dr. Tew stated that adhesions is a scar tissue laid down within the abdominal cavity, and that some people are more prone to have adhesions than others because of the type tissue they have. Adhesions have a blood supply but would not have any nerve fiber, and the adhesions could be cut without any pain. He stated that after an appendectomy, adhesions would form immediately to some degree and gradually increase up to a point, but once they form, they do not grow. Dr. Tew testified that adhesions are not disabling in themselves, but disabling only when they interfere with something else as where they are extensive and cause an obstruction to the bowel function. (Tr. pp. 33-36).

Dr. Tew reviewed the operative procedure report prepared by Dr. D. O. Sessions and expressed the opinion that the adhesions were "rather limited," and the further opinion that because of the minimal extent of adhesions found, the surgery for removal of the adhesions was unnecessary. (Tr. pp. 38-40).

After the operation was performed, Dr. Sessions presented to Dr. H. R. Wilcox, a pathologist, a specimen of the tissue in the area of the appendix, and Dr. Wilcox found a small portion of a suture in the cystic mass. Dr. Wilcox could find no acute inflammation and gave a diagnosis of "granulation tissue from appendeceal stump." (Tr. p. 72; Report by Dr. H. R. Wilcox in

Exhibits 8, 9 and 10 of the Medical Records of Buna Medical Center Hospital). Dr. Tew expressed the opinion that a nonabsorbable suture was used and that the finding of a portion of it, as was found by Dr. Wilcox, was to be expected, and he stated further that a suture would not cause an infection. (Tr. pp. 41-42).

Respondent testified that he was vomiting, sick and could not have continued his duties as a pantryman and that Captain Mappin acted immediately and sent him to Inflot, the agent. The Inflot agent understood that Respondent was ill and wanted to go to a doctor. The hospital was right across the street from the Inflot office. Respondent waited in the waiting room fifteen to twenty minutes, when a nurse came in and took blood from his finger for a blood test. Within about twenty to twenty-five minutes after the blood was taken, the decision was made to perform the appendectomy. (Tr. pp. 46-50). Respondent was conscious during the entire procedure, which was performed by a male doctor and nurses were around him during the operation. When asked if the room was clean, Respondent stated it was "fair," and when asked if the nurses took care of his needs, he stated "mostly." He stated that he was given a shot each day while in the hospital and he believed it to be penicillin. (Tr. pp. 50-53).